

1 SCOTT N. SCHOOLS (SC 9990)
United States Attorney
2 JOANN M. SWANSON (CSBN 88143)
Chief, Civil Division
3 MELANIE L. PROCTOR (CSBN 228971)
Melanie.Proctor@usdoj.gov
4 Assistant United States Attorney

5 450 Golden Gate Avenue, Box 36055
6 San Francisco, California 94102-3495
6 Telephone: (415) 436-6730
FAX: (415) 436-6927

Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEPHEN CHANG and HONGYAN
CHEN,) No. C 07-3562 SBA
Plaintiffs,)
v.) DEFENDANTS' OPPOSITION TO
MICHAEL CHERTOFF, Secretary,) PLAINTIFF'S MOTION FOR SUMMARY
Department of Homeland Security;) JUDGMENT AND CROSS MOTION FOR
ROBERT S. MUELLER, III, Director of the) SUMMARY JUDGMENT; AND
Federal Bureau of Investigation,) [PROPOSED] ORDER
Defendants.)
Date: October 16, 2007
Time: 1:00 p.m.
Courtroom: 3, 3rd Floor

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

-- STEPHEN CHANG and HONGYAN)
12 CHEN,)
13 Plaintiffs,)
14 v.)
15 MICHAEL CHERTOFF, Secretary,)
Department of Homeland Security;)
16 ROBERT S. MUELLER, III, Director of the)
Federal Bureau of Investigation,)
17 Defendants.)
18 _____)
No. C 07-3562 SBA
DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND CROSS MOTION FOR
SUMMARY JUDGMENT; AND
[PROPOSED] ORDER
Date: October 16, 2007
Time: 1:00 p.m.
Courtroom: 3, 3rd Floor

I. NOTICE OF MOTION

20 PLEASE TAKE NOTICE THAT on October 16, 2007, at 1:00 p.m., before the Honorable
21 Saundra B. Armstrong, Courtroom No. 3, 1301 Clay Street, Oakland, California 94612, Defendants
22 Michael Chertoff, et al., by their attorneys, Scott N. Schools, United States Attorney for the Northern
23 District of California, and Melanie L. Proctor, Assistant U.S. Attorney, will move this Court for an
24 order granting summary judgment in Defendants' favor. Defendants' Motion is based on this notice,
25 the points and authorities in support of this motion, the declarations of Michael Cannon and
26 Constance Yuen, the pleadings on file in this matter, and on such oral argument as the Court may
27 permit.

28 | //

II. INTRODUCTION

Plaintiffs Stephen Chang and Hongyan Chen (“Plaintiffs”) ask this Court to issue a writ of mandamus, compelling Defendants reach a decision on Plaintiff Chen’s application for adjustment of status which has been pending for less than two years. They also ask the Court to find that Defendants have violated the Administrative Procedure Act (“APA”), and to grant relief under the Declaratory Judgment Act. Plaintiffs’ claims must fail. Plaintiff Chen’s application remains pending because her name check is not yet complete. Additionally, Plaintiff Chen’s name check has been pending only since February 10, 2006, less than two years. The facts are undisputed, and Defendants are entitled to judgment as a matter of law. Accordingly, Defendants respectfully ask this Court to grant their motion for summary judgment.

III. BACKGROUND

On February 1, 2006, Plaintiff Chen filed an I-485 application for adjustment of status, based on her marriage to a United States citizen. See Declaration of Constance Yuen, pp. 7-8 ¶ 19 (attached as Exh. A). On the same date, Plaintiff Chang filed a visa petition on Plaintiff Chen's behalf. Id. On February 10, 2006, U.S. Citizenship and Immigration Services ("USCIS") submitted a name check request to the Federal Bureau of Investigation ("FBI"). Id. On May 17, 2006, Plaintiffs appeared at the Application Support Center for an interview. Id. Plaintiffs' application and visa petition are ready to be adjudicated except for Plaintiff Chen's pending background and security check Id., p. 8 ¶ 20.

Plaintiff filed the instant Complaint on July 10, 2007. On September 10, 2007, Defendant Michael Chertoff answered the Complaint, and Defendant Robert S. Mueller moved to dismiss for lack of jurisdiction. On September 10, 2007, Plaintiffs moved the Court for summary judgment.

IV. GENERAL PRINCIPLES APPLICABLE TO THIS MOTION

A. LEGAL STANDARD

Summary judgment is appropriate when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is genuine only if there is sufficient evidence for a

1 reasonable fact finder to find for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477
 2 U.S. 242, 248-49 (1986). A fact is material if the fact may affect the outcome of the case. See id.
 3 at 248. The Ninth Circuit has declared that “[i]n considering a motion for summary judgment, the
 4 court may not weigh the evidence or make credibility determinations, and is required to draw all
 5 inferences in a light most favorable to the non-moving party.” Freeman v. Arpaio, 125 F.3d 732,
 6 735 (9th Cir. 1997). A principal purpose of the summary judgment procedure is to identify and
 7 dispose of factually unsupported claims. See Celotex Corp. v. Cattrett, 477 U.S. 317, 323-24 (1986).

8 B. ADJUSTMENT OF STATUS

9 Section 245 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1255, authorizes
 10 the Secretary of the Department of Homeland Security (“Secretary”)¹ to adjust to permanent
 11 residence status certain aliens who have been admitted into the United States. Adjustment of status
 12 is committed to the Secretary’s discretion as a matter of law. Section 1255(a) expressly provides:

13 The status of an alien who was inspected and admitted or paroled into the United
 14 States . . . may be adjusted by the [Secretary], in his discretion and under such
 regulations as he may prescribe, to that of an alien lawfully admitted for permanent
 15 residence[.]

16 8 U.S.C. 1255(a) (emphasis added). An applicant for adjustment of status must meet three
 17 requirements: she must apply for such status, be eligible to receive an immigrant visa, and the visa
 18 must be immediately available to her at the time she applies. Id. Significantly, the statute does not
 19 set forth any time frame in which a determination must be made on an application to adjust status.
 20 In addition, the regulations setting forth the procedures for aliens to apply to adjust status do not set
 21 forth a time frame for adjudication, and allow discretion in how to conduct the adjudication. See
 22 8 C.F.R. § 245 et seq.

23 Before a decision is rendered on an alien’s application to adjust status, U.S. Citizenship and
 24 Immigration Services (“USCIS”) conducts several forms of security and background checks to
 25

26 ¹On March 1, 2003, the Department of Homeland Security and its United States Citizenship
 27 and Immigration Services assumed responsibility for the adjustment program. 6 U.S.C. § 271(b).
 28 Accordingly, the discretion formerly vested in the Attorney General is now vested in the Secretary
 of Homeland Security. 6 U.S.C. § 551(d).

1 ensure that the alien is eligible for the benefit sought and that she is not a risk to national security
 2 or public safety. See Exh. A, p. 1 ¶ 3. USCIS also conducts investigations into the bona fides of
 3 petitions and applications that have been filed, in order to maintain the integrity of the application
 4 process and to ensure that there is no fraud in the application process. See 8 U.S.C. § 1105(a)
 5 (authorizing “direct and continuous liaison with the Directors of the Federal Bureau of Investigation
 6 [(“FBI”)] and the Central Intelligence Agency and with other internal security officers of the
 7 Government for the purpose of obtaining and exchanging information for use in enforcing the
 8 provisions of this chapter in the interest of the internal and border security of the United States”).
 9 These checks currently include extensive checks of various law enforcement databases, including
 10 the FBI. See Exh. A, p. 2 ¶ 4.

11 The FBI’s name check process is quite complex. See Declaration of Michael Cannon., p.
 12 2 ¶ 4 (attached as Exh. B). Name checks are performed at the request of a variety of organizations,
 13 including the federal judiciary, friendly foreign police and intelligence agencies, and state and local
 14 governments. Id. When the FBI conducts a name check, the name is checked against the FBI’s
 15 Universal Index, in a four-stage process. Id., pp. 5-7 ¶¶ 11-15. Generally, the FBI employs a first-
 16 in, first-served protocol. Id., p. 8, ¶ 18. However, when an applicant’s name check requires a
 17 review of numerous FBI records and files, the name check may require additional time until all
 18 responsive records are located and reviewed. Id. USCIS determines which name checks are to be
 19 expedited. Id.; see also USCIS Clarifies Criteria to Expedite FBI Name Check (attached as Exh. C).
 20 An expedited name check proceeds to the front of the queue, in front of others awaiting processing.
 21 Exh. B, p. 8 ¶ 18.

22 As discussed in the Cannon Declaration, the FBI processed more than 3.4 million name
 23 checks during fiscal year 2006. Id., p. 8 ¶ 19. The FBI is working as expeditiously as possible to
 24 reduce the small percentage of immigration name checks for which a backlog exists. This backlog
 25 results from the vast number of requests the FBI receives from USCIS and other customers, as well
 26 as the requirement for enhanced security measures existing since September 11, 2001. Id., p. 9 ¶
 27 21. A variety of factors play into processing times, including “hits,” common names, and expedited
 28 name checks. Id., p. 10 ¶ 24.

1 C. RELIEF AVAILABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT
 2 AND THE MANDAMUS ACT

3 Judicial review under the APA, 5 U.S.C. § 701, et seq., is specifically precluded where
 4 “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). Agency action,
 5 as defined under the APA, also includes “a failure to act.” 5 U.S.C. § 551(13). Under 5 U.S.C.
 6 § 706(1), a court may compel “agency action unlawfully withheld or unreasonably delayed.” The
 7 elements of a claim under § 706(1) are the existence of a discrete, ministerial duty; a delay in
 8 carrying out that duty; and a determination that the delay was unlawful or unreasonable in light of
 9 prejudice to one of the parties. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004);
 10 Rockbridge v. Lincoln, 449 F.2d 567, 569-73 (9th Cir. 1971).

11 The APA does not provide an independent jurisdictional basis. Califano v. Sanders, 430
 12 U.S. 99, 107 (1977); Staacke v. U.S. Department of Labor, 841 F.2d 278, 282 (9th Cir. 1988).
 13 Rather, it merely provides the standards for reviewing agency action once jurisdiction is otherwise
 14 established. Staacke, 841 F.2d at 282. Similarly, the Declaratory Judgment Act, 28 U.S.C. § 2201
 15 (“DJA”), does not provide an independent basis for jurisdiction; rather, it only expands the range
 16 of remedies available in federal courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-
 17 72 (1950).

18 Mandamus is an extraordinary remedy. See Cheney v. United States District Court for
 19 the District of Columbia, 542 U.S. 367, 392 (2004) (Stevens, J., concurring); Allied Chemical
 20 Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980). The United States Supreme Court has stated that
 21 “[t]he common law writ of mandamus is intended to provide a remedy for a plaintiff only if . . . the
 22 defendant owes him a clear nondiscretionary duty.” Heckler v. Ringer, 466 U.S. 602, 616 (1984).

23 The Ninth Circuit has explained that

24 [m]andamus . . . is available to compel a federal official to perform a duty only if: (1)
 25 the individual’s claim is clear and certain; (2) the official’s duty is nondiscretionary,
 26 ministerial, and so plainly prescribed as to be free from doubt, and (3) no other
 adequate remedy is available.

27 Kildare v. Saenz, 325 F.3d 1078, 1084 (9th Cir. 2003). Thus, “‘mandamus does not lie to review
 28 the discretionary acts of officials.’” See Nova Stylings Inc. v. Ladd, 695 F.2d 1179, 1180 (9th Cir.

1 1983), quoting Nelson v. Kleppe, 457 F. Supp. 5, 8 (D. Idaho 1976).

2 V. ANALYSIS

3 A. ALL DEFENDANTS EXCEPT CHERTOFF SHOULD BE DISMISSED

4 Courts in this district have recognized that since March 1, 2003, the Department of
 5 Homeland Security has been the agency responsible for implementing the Immigration and
 6 Nationality Act. See 6 U.S.C. §§ 271(b)(5), 557; Konchitsky v. Chertoff, No. C-07-00294 RMW,
 7 2007 WL 2070325, at *6 (N.D. Cal. July 13, 2007); Dmitriev v. Chertoff, No. C 06-7677 JW, 2007
 8 WL 1319533, at *4 (N.D. Cal. May 4, 2007). Accordingly, the only relevant Defendant here is
 9 Michael Chertoff, in his capacity as Secretary of the Department of Homeland Security, and
 10 Defendant Robert S. Mueller should be dismissed.

11 B. RELIEF IS NOT AVAILABLE UNDER THE APA

12 1. Plaintiffs Seek To Compel Multiple Actions

13 The United States Supreme Court's decision in Southern Utah Wilderness Alliance mandates
 14 against granting relief. There, the Court determined that the APA's reference to "a failure to act"
 15 is limited to a discrete action that the agency is required to take. 542 U.S. at 64. Here, Plaintiffs ask
 16 the Court to compel multiple actions, including whether USCIS requests an expedited name check,
 17 and the pace at which USCIS issues a decision once Plaintiff Chen's name check is complete. See
 18 Complaint, p. 4, Prayer for Relief. USCIS has exercised its discretion to determine which cases
 19 merit being moved to the head of the name check line for expedited processing. See Exh. C.
 20 Plaintiffs can point to no law requiring USCIS to request that the FBI expedite Plaintiff Chen's name
 21 check, or setting a time frame upon the FBI's exercise of discretion in conducting the investigation.
 22 Furthermore, it is possible that upon receiving the results of the name check, USCIS will need to
 23 conduct further investigation. Accordingly, Plaintiffs' request for relief necessarily would impact
 24 multiple actions. As such, relief is not available under the APA.

25 2. Compelling Action By USCIS Would Necessarily Interfere With the FBI's Discretion

27 Numerous courts have recognized the FBI's discretion "in determining the timing for
 28 conducting the many name check requests that it receives and the manner in which to conduct those

1 checks.” Yan v. Mueller, No. H-07-0313, 2007 WL 1521732, at *6 (S.D. Tex. May 24, 2007) ; see also Takkallapalli v. Chertoff, 487 F. Supp. 2d 1094, 1099 (W.D. Mo. 2007) (stating that where delay was due to incomplete name check, “Defendants’ conduct [was] sufficient to avoid judicial intervention.”); Li v. Chertoff, 482 F. Supp. 2d 1172, 1179 (S.D. Cal. 2007) (recognizing that USCIS has wide discretion “in matters pertaining to the pace of the adjudication of I-485 applications.”); Sozanski v. Chertoff, et al., No. 06-CV-0993 N, 2006 WL 4516968, at *1 (N.D. Tex. Dec. 11, 2006) (holding that federal district courts lack jurisdiction to compel the FBI to perform name checks in adjustment of status cases). Compelling USCIS to process Plaintiff Chen’s application in a certain time frame would amount to compelling the FBI to exercise its discretion in a certain manner. Accordingly, Plaintiffs essentially seek to compel a discretionary action, and relief is unavailable under the APA

12 3. The Delay is Reasonable

13 Even if the actions at issue were not discretionary, Plaintiffs have failed to establish that a
 14 delay of approximately seventeen months, as alleged in their Complaint, constitutes unreasonable
 15 delay. To determine whether a delay is egregious, such that relief under the APA is warranted,
 16 several circuits have adopted the six-part test first articulated in Telecomm. Research and Action
 17 Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (“TRAC”).

18 a. A Rule of Reason Governs the Agency Decisions at Issue

19 The first TRAC factor requires an agency to govern decisions with a rule of reason. TRAC,
 20 750 F.2d at 80. Given the large volume of petitions and applications requiring adjudication, the
 21 extensive background check that is required for national security and public safety, and the limited
 22 resources available to it, the FBI is proceeding in an orderly fashion with the completion of name
 23 checks in the order in which they are received. See Eldeeb v. Chertoff, No. 07cv236-T-17EAJ,
 24 2007 WL 2209231, at *2 (M.D. Fla. July 30, 2007). Once the FBI name check in this case has been
 25 completed, USCIS will promptly adjudicate Plaintiffs’ applications. Exh. A, p. 8 ¶ 20. Further,
 26 USCIS regularly monitors the case to determine whether the name check remains pending. Id., p.
 27 4 ¶ 14. Public safety requires USCIS to make certain that the background checks have been
 28 completed and any outstanding issues resolved before it reaches a decision.

In Plaintiffs' case, this means that USCIS must await the results of the FBI name check before reaching a decision on the I-485 application, and the FBI must be given time to perform an accurate and thorough check. Exh. A, p. 8 ¶20. The FBI's "first in, first out" processing approach is a method that is "deserving of deference." Liberty Fund, Inc. v. Chao, 394 F. Supp. 2d 105, 118 (D.D.C. 2005); see also In re Barr Lab. Inc., 930 F.2d 72, 76 (D.C. Cir. 1991) ("The agency is in a unique and authoritative position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way.").

b. There Is No Congressionally Mandated Timetable

The second TRAC factor does not apply to the present case because there is neither a statutory requirement that the FBI process the name check nor one requiring USCIS to adjudicate the application within a certain amount of time. Contra Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 3001(g), 118 Stat. 3638 (2004) (requiring Government personnel security checks to be completed within a certain time frame). Additionally, Congress has not provided any clear guidelines indicating the speed at which the FBI and USCIS should conduct its adjudications. Congress has, however, required that USCIS conduct certain criminal and national security background checks to ensure eligibility for adjustment of status. See 8 U.S.C. §§ 1105(b)(1), 1255(a).

Defendants acknowledge that Congress has observed that in most instances, applications for immigration benefits should not take more than 180 days to adjudicate. 8 U.S.C. § 1571. However, the statute expresses a “sense of Congress,” and is not a mandate. *Id.* The language in § 1571 is merely precatory, and does not impose a deadline on Defendants. See Wright v. City of Roanoke Redevelopment and Housing, 479 U.S. 418, 432 (1987) (statute phrased in precatory terms does not create a substantive right); Orkin v. Taylor, 487 F.3d 734, 739 (9th Cir. 2007) (“‘Sense of Congress’ provisions are precatory provisions, which do not in themselves create individual rights, or, for that matter, any enforceable law.”).

Furthermore, the statute was enacted in 2000, prior to the events of September 11, 2001. See Immigration Services and Infrastructure Improvements Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (enacted Oct. 17, 2000). Accordingly, it no longer provides a meaningful standard against

1 which the Court can measure the delay at issue in this case. The events of September 11, 2001
 2 marked a dramatic shift in issues involving national security. See Exh. B, pp. 8-9 ¶¶ 19-20. Courts
 3 have taken note of this change:

4 It is well known that since September of 2001, the FBI's resources have been sorely
 5 taxed by the demands that have been made on it by the Administration. Legitimate
 6 national security concerns, intensified by the sophistication of some of the threats to
 7 the lives of people in this country, have forced federal agencies to be considerably
 8 more careful and thorough in their investigations than they were in the past. In short,
 9 there was a lot more work for the FBI to do and it had to be done a lot more
 10 carefully.

11 Razaq v. Poulos, No. C 06-2461 WDB, 2007 WL 61884, at *12 (N.D. Cal. Jan. 8, 2007).

12 Where there are no statutory guidelines, and in order to establish a "rule of reason," this
 13 Court must consider the factors that contribute to the backlogs that both the FBI and USCIS face.
 14 See, e.g., INS v. Miranda, 459 U.S. 14, 18 (1982) ("Both the number of the applications received
 15 by the INS and the need to investigate their validity may make it difficult for the agency to process
 16 an application as promptly as may be desirable"). In making a request for immigration benefits,
 17 "aliens only have those statutory rights granted by Congress," Marincas v. Lewis, 92 F.3d 195, 203
 18 (3d Cir. 1996), and no federal statute or regulation prescribes a hard-and-fast deadline for acting
 19 upon immigration applications, such as the ones in this case, submitted to the USCIS. See Cordoba
 20 v. McElroy, 78 F. Supp. 2d 240, 244 (S.D.N.Y. 2000).

21 As discussed in Eldeeb, the FBI name check is a complex process. Eldeeb, 2007 WL
 22 2209231, at *2; see also Exh. B, pp. 2-6 ¶¶ 4-12. It involves a check of a variety of sources, and
 23 although most name checks are resolved in a matter of hours, approximately 32 percent require
 24 additional, manual review. Eldeeb, 2007 WL 2209231, at *2. Of those remaining checks, 22
 25 percent are returned within two months. Id. The FBI processes name checks chronologically, based
 26 on the date the name check is submitted. Id.

27 Before September 11, 2001, the FBI processed approximately 2.5 million name checks per
 28 year, checking only the "main" files. Id. at *3. In Fiscal Year 2006, the FBI processed over 3.4
 million name checks. Id. In addition, the FBI began checking "reference" files. Id. This expansion
 of the name check procedures prompted USCIS, in December 2002 and January 2003, to resubmit

1 2.7 million name check requests, for those with pending applications for immigration benefits. *Id.*
 2 at *4. The FBI is currently still working to resolve 440,000 of these resubmitted name checks;
 3 because the FBI processes name checks chronologically, the processing of regular name checks has
 4 been delayed. *Id.* Name checks that exceed the two month window require personal attention of
 5 the processing agent. *Id.* at *5. The FBI currently processes approximately 340,000 name checks
 6 per year by hand. *Id.* Thus, it is evident that there are substantial factors contributing to the
 7 backlog.

8 c. The Impact of the Delay is Minimal in Comparison with the National
Interest in Complete and Thorough Background Checks
 9

10 The third TRAC factor is the delay's impact on human health, welfare, and economic harm
 11 to Plaintiffs. This factor's analysis overlaps with the analysis of the fifth TRAC factor, the nature
 12 and extent of the interests prejudiced by the delay. TRAC, 750 F.2d at 80; Liberty Fund, 394 F.
 13 Supp. 2d at 118. Plaintiffs may be inconvenienced by the delay in adjudication, but this individual
 14 interest cannot outweigh Defendants' interests in fully and accurately completing each name check.
 15 Security background checks for individuals seeking immigration benefits is a key component to our
 16 nation's national security. See The 9/11 Commission Report, 2004 WL 1634382 at 352 (July 22,
 17 2004) (finding that, "had the immigration system set a higher bar for determining whether
 18 individuals are who or what they claim to be....it could have potentially have excluded, removed,
 19 or come into further contact with several hijackers who did not appear to meet the terms for
 20 admitting short-term visitors.").

21 In most cases, the adverse impact caused by the delay is not substantial. Applicants for
 22 adjustment of status who have pending applications may apply for and obtain employment
 23 authorization for the entire time the application is pending. Additionally, most applicants may also
 24 apply for and receive advance parole to enable them to travel abroad during the pendency of their
 25 application. Exh. A, pp. 6-7 ¶ 18. Even when a more substantial impact is felt by an applicant, this
 26 impact, "is unlikely to rise to the level that would significantly change the Court's assessment of the
 27 unreasonableness of the delay in light of the importance of the agency's competing priorities."
 28 Liberty Fund, 394 F. Supp. 2d at 118. As the highest of priorities, "our national security requires

1 that caution and thoroughness in these matters not be sacrificed for the sake of expediency.” Safadi
2 v. Howard, 466 F. Supp. 2d 696, 701 (E.D. Va. 2006). Although a delay in processing may have
3 a negative impact, “nevertheless, in this post-9/11 context, agencies must have the freedom to
4 carefully and thoroughly investigate these applications without judicial interference in their
5 priorities.” Patil v. Mueller, et al., No. C 07cv71 JCC, 2007 WL 1302752 at *2 (E.D. Va. Apr. 30,
6 2007) (holding that the Court had no jurisdiction to issue a writ of mandamus due to legal and policy
7 considerations). Thus, when balancing the agencies’ interests in defending against threats to
8 national security against the Plaintiffs’ interest in adjudication, the interests of the nation must
9 prevail.

d. The Effect of Expedition Would Intrude on Agency Discretion and Prejudice Other “First In Line” Applicants

12 The court in Sze v. INS, No. C 97-0569 SC, 1997 WL 446236, at *8 (N.D. Cal.
13 Jul. 24, 1997), which applied the TRAC test to a similar complained-of delay in the immigration
14 context, found the fourth factor to be the most persuasive. Id. at *8. The court, in refusing to grant
15 relief under the APA, held that “the reasonableness of administrative delays must be judged in light
16 of the resources available to the agency.” Id. The court also recognized that by granting relief, it
17 “would, at best, reorder the queue of applications, thereby leading to little net benefit.” Id.; see also
18 Liberty Fund, 394 F. Supp. 2d at 117 (deferring to agency’s decision on how to handle competing
19 applications for permanent labor certifications).

20 In Liberty Fund, the court refused to grant mandamus relief where it was requested solely
21 due to the length of the delay in processing alien labor certifications. 394 F. Supp. 2d at 115.
22 Applying the TRAC factors, the court held that without a statutory timetable governing agency
23 action, the TRAC factor, “that weighs most heavily under the circumstances of the case is the fourth
24 factor - the effect of granting relief on the agency’s competing priorities.” Id. at 116. The court
25 reasoned that the agency’s “first in, first out processing” was deserving of deference because any
26 grant of relief to petitioners would result in no net gain - petitioners would move to the front of the
27 queue at the expense of other similarly situated applicants. After examining the agency’s priorities,
28 growing workload, and good faith efforts to alleviate the delays, the court concluded that mandamus

1 relief was not warranted. *Id.* at 119.

2 Just as in Liberty Fund, Plaintiffs' argument of unreasonable delay in this case must also fail.
 3 Plaintiffs ask this Court to find that USCIS has not adjudicated the I-130 and I-485 applications in
 4 a reasonable period of time, here a period of less than two years. Plaintiffs' legal arguments under
 5 Sections 555(b) and 706(1) of the APA fail because adjudication has not been unreasonably delayed.
 6 Contrary to Plaintiffs' pleadings, the existence of administrative delays does not mean that such
 7 delays are unreasonable. Courts have noted that "the reasonableness of such delays must be judged
 8 in light of the resources that Congress has supplied to the agency for the exercise of its functions,
 9 as well as the impact of the delays on the applicants' interests." Fraga v. Smith, 607 F. Supp. 517,
 10 521 (D. Or. 1985) (citing Wright v. Califano, 587 F.2d 345, 353 (7th Cir. 1978)). Indeed, "[t]he
 11 passage of time alone is rarely enough to justify a court's intervention in the administrative process."
 12 Fraga, 607 F. Supp. at 521.

13 Similarly, the effect of expediting delayed agency action under the fourth TRAC factor
 14 would unquestionably impinge upon agency activities and responsibilities of a higher priority. Such
 15 an order would intrude on the agency's discretion and ability to fulfill its highest priority of
 16 safeguarding the nation. See Boim v. Quranic Literacy Institute, 291 F.3d 1000, 1027 (7th Cir.
 17 2002) ("the government's interest in preventing terrorism is not only important but paramount"); see
 18 also Walters v. Reno, 145 F.3d 1032, 1043 (9th Cir. 1998) ("The Government's interests in the
 19 administration of its immigration laws and in preventing [immigration related] document fraud are
 20 likewise considerable.")

21 Delays in the processing of FBI name checks arise for a variety of reasons. First, USCIS is
 22 not the only agency that engages in the FBI name check program. Notably, the FBI and USCIS
 23 processes' do not occur in vacuums. Any requirement that the FBI or USCIS process Plaintiff
 24 Chen's name check or application within a particular time limit will have the unfortunate side effect
 25 of slowing the processing for other applicants who are also awaiting action on their applications for
 26 immigration benefits.

27 The requests generally processed out-of-order are cases expedited by USCIS for specific
 28 health, welfare, or economic reasons. See Exh. C. Absent these compelling reasons, moving some

1 individuals to the front of the queue would simply move that group ahead of others who also had
 2 been waiting, resulting in no net gain in processing. See In re Barr Lab., 930 F.2d at 75; Mashpee
 3 Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1101 (D.C. Cir. 2003). Furthermore,
 4 ordering Plaintiffs' case to the front of the line sets the precedent that the more litigious applicants
 5 are most likely to move to the top of the pile at the expense of other applicants that have waited even
 6 longer, but may not have the resources to file suit. Manzoor v. Chertoff, 472 F. Supp 2d 801, 809
 7 (E.D. Va. 2007); see also Yan, 2007 WL 1521732 at *7 (holding that a grant of review of
 8 petitioner's claims would only, "encourage other applicants to file suit to receive expedited
 9 treatment rather than wait their turn in line.").

10 Moreover, the courts have been cautioned against "engrafting their own notions of proper
 11 procedures upon agencies entrusted with substantive functions by Congress." Vermont Yankee
 12 Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 525 (1978). Here,
 13 where "there are no allegations of bad faith, a dilatory attitude, or a lack of evenhandedness on the
 14 part of the agency, the reasonableness of the delays in terms of the legislatively imposed 'reasonable
 15 dispatch' duty must be judged in light of the resources that Congress has supplied, as well as the
 16 impact of the delays on the applicants' interests." Wright, 587 F.2d at 353. The complexity of
 17 agency investigations, as well as the extent that the individual applicants contributed to delays, also
 18 enter into a court's deliberations. See Saleh v. Ridge, 367 F. Supp. 2d 508, 512 (S.D.N.Y. 2005).
 19 An agency's good faith efforts to address delays militate against a finding of unreasonableness. See
 20 Wright, 587 F.2d at 345.

21 e. The Agencies are Exercising Every Effort to Address the Delay

22 The sixth and last TRAC factor provides that a court need not find impropriety to hold that
 23 an agency action is unreasonably delayed. Conversely, "the good faith of the agency in addressing
 24 the delay weighs against mandamus." Liberty Fund, 394 F. Supp. 2d at 120. Here, the delay is due
 25 to the pendency of Plaintiff Chen's FBI name check. See Exh. A, p. 8 ¶ 20. As discussed above, the
 26 FBI is processing the name checks to the best of its ability, and USCIS is monitoring the case to
 27 ensure that once the name check is complete, USCIS can complete adjudication. Thus, balancing
 28 the TRAC factors demonstrates the reasonableness of the Government's actions.

1 In addition, Plaintiffs have failed to show that USCIS will refuse to adjudicate their
 2 applications once the FBI completes the requisite name check. See Saleh, 367 F. Supp. 2d at 513;
 3 see also Eldeeb, 2007 WL 209231, at *17 (finding that the plaintiff had failed to show that USCIS
 4 was refusing to act on his application). On the contrary, the FBI and USCIS are taking active steps
 5 towards completing the background checks for adjudication of their applications. Specifically,
 6 USCIS is making every effort to complete adjudication as soon as the name check is completed.
 7 Exh. A, pp. 7-8 ¶ 19.

8 Many courts have refused to grant relief under the APA, even when naturalization or other
 9 immigration applications were pending for significant time periods. See Saleh, 367 F. Supp. 2d at
 10 513 (finding five-year delay not in violation of APA in part in light of volume of applications);
 11 Espin v. Gantner, 381 F. Supp. 2d 261, 266 (S.D.N.Y. 2005) (over three-year delay not unreasonable
 12 because of government's limited resources and substantial caseload); Alkenani v. Barrows, 356 F.
 13 Supp. 2d 652, 656-57 (N.D. Tex. 2005) (no unreasonable delay found in naturalization context
 14 because of need to wait for completion of FBI investigation). Just as in these cases, Plaintiffs in the
 15 present case insist that this Court find an unreasonable delay based solely on the amount of time
 16 passed since receipt of her application. However, the law requires a more in-depth analysis for
 17 mandamus relief under the APA. A review of the six TRAC factors shows that Defendants have not
 18 unreasonably delayed actions pertaining to Plaintiffs' applications.

19 C. MANDAMUS IS NOT AVAILABLE BECAUSE PLAINTIFF'S CLAIM IS NOT
 20 CLEAR AND CERTAIN

21 Mandamus is reserved for those situations in which the plaintiff's claim is clear and certain.
 22 Kildare, 325 F.3d at 1078. Here, because Plaintiffs have failed to establish that action on their
 23 applications have been unreasonably delayed, they have failed to show that their claim is so clear
 24 and certain that mandamus is justified. Furthermore, USCIS has exercised its discretion in
 25 determining which name checks should be expedited. See Exh. C. Plaintiffs' case meets none of
 26 these criteria.

27 ///

28 ///

VI. CONCLUSION

For the foregoing reasons, the Government respectfully asks the Court to deny Plaintiffs' motion for summary judgment, dismiss Defendant Mueller, and grant Defendant Chertoff's motion for summary judgment as a matter of law.

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Respectfully submitted,

SCOTT N. SCHOOLS
United States Attorney

/S/
MELANIE L. PROCTOR
Assistant United States Attorney
Attorneys for Defendants